

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL KIRKLAND,

Plaintiff,

v.

EMHART GLASS S.A., et al.,

Defendants.

CASE NO. C10-5125BHS

ORDER DENYING
DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendants' motion for summary judgment (Dkt. 52). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby denies the motion for the reasons stated herein.

I. PROCEDURAL HISTORY

On February 25, 2010, Plaintiff Michael Kirkland ("Kirkland") filed the original complaint in this action alleging claims against Defendants relating to an accident that occurred on November 26, 2008, at Kirkland's place of employment, the Cameron Family Glass Packaging plant ("Cameron"). Dkt. 1. On February 16, 2011, Defendants filed their motion for partial summary judgment (Dkt. 52). On March 7, 2011, Kirkland filed a response to Defendants' motion which he titled as an opposition and cross-motion for partial summary judgment. Dkt. 57. However, because the Court's scheduling order

1 required that dispositive motions be filed no later than February 16, 2011, the Court will
2 not consider Kirkland's response as a cross-motion for summary judgment. On March
3 11, 2011, Defendants replied (Dkt. 69).

4 **II. RELEVANT FACTUAL BACKGROUND**

5 Solely for purposes of deciding the instant motion, the Court will assume the facts
6 as stated in Defendants' motion for partial summary judgment (Dkt. 52 at 2-11) because,
7 even when such facts are taken as true, Defendants' motion must be denied.

8 **III. DISCUSSION**

9 In his complaint, Kirkland alleges as follows:

10 4.1 Defendant Emhart Glass is liable for Mr. Kirkland's injuries
11 because the subject Individual Section Machine was not reasonably safe in
12 its design, and because adequate warnings were not provided with the
13 product or after manufacture, and as such, the subject Individual Section
14 Machine was unsafe to an extent beyond that contemplated by an ordinary
15 user and consumer as set forth in RCW 7.72.030.

16 4.2 The defects in the design of the subject Individual Section
17 Machine include, but are not limited to, the following: (a) the flip plate at
18 the location where Michael Kirkland was working did not extend as far as
19 the trapezoidal foot pad at that location, and (b) Defendant Emhart Glass
20 failed to provide a reasonably safe means of protecting workers from
21 exposure to injury resulting from contact with red hot bottles on the
22 conveyor when performing mold changes.

23 4.3 Defendant Emhart Glass is strictly liable to Plaintiff because the
24 Individual Section Machine was unsafe to an extent beyond that which
25 would be contemplated by an ordinary user.

26 Dkt. 1 at 11-12. In the instant motion, Defendants state that they anticipate Kirkland will
27 attempt to bring at trial six theories of liability to support his claim under Washington's
28 Product Liability Act ("WPLA") and seek summary judgment on the following five
theories: (1) failure to warn based upon a risk-utility analysis; (2) failure to warn based
upon a consumer expectations test; (3) a post-manufacturing failure to warn based upon a
negligence standard; (4) design defect based upon a consumer expectations test; and (5) a
general strict liability claim based upon consumer expectations. Dkt. 52 at 1. Thus,

1 Defendants seek summary judgment of all of Kirkland's theories of liability with the
2 exception of a design defect based upon a risk-utility test. *Id.*

3 **A. Summary Judgment Standard**

4 Summary judgment is proper only if the pleadings, the discovery and disclosure
5 materials on file, and any affidavits show that there is no genuine issue as to any material
6 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
7 The moving party is entitled to judgment as a matter of law when the nonmoving party
8 fails to make a sufficient showing on an essential element of a claim in the case on which
9 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
10 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,
11 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*
12 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
13 present specific, significant probative evidence, not simply "some metaphysical doubt").
14 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if
15 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
16 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
17 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d
18 626, 630 (9th Cir. 1987).

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20 The determination of the existence of a material fact is often a close question. The
21 Court must consider the substantive evidentiary burden that the nonmoving party must
22 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
23 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
24 issues of controversy in favor of the nonmoving party only when the facts specifically
25 attested by that party contradict facts specifically attested by the moving party. The
26 nonmoving party may not merely state that it will discredit the moving party's evidence at
27 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*
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1 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
2 nonspecific statements in affidavits are not sufficient, and missing facts will not be
3 presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

4 **B. WPLA**

5 The WPLA, RCW 7.72 et seq. , is the exclusive remedy for product liability claims
6 in Washington. *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn. 2d 847, 853
7 (1989). The WPLA is preemptive and its scope is broadly defined to include any claim or
8 action brought for harm caused by the product. *Id.* The purpose of the statute is to
9 eliminate common law remedies and provide a single cause of action. *Id.* at 854. The
10 WPLA creates a single cause of action for product-related harm with specified statutory
11 requirements for proof. *Stanton v. Bayliner Marine Corp.*, 123 Wn. 2d 64, 71 (1993). *See*
12 *also, Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d
13 299 (1993) (stating that the WPLA creates a single cause of action for product-related
14 harms, and supplants previously existing common law remedies, including common law
15 actions for negligence).

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17 The WPLA imposes liability on a product manufacturer if its product is not
18 reasonably safe as designed (design defect claim) or because adequate warnings or
19 instructions were not provided (failure to warn claim). RCW 7.72.030(1). In a failure to
20 warn claim, the manufacturer may be liable for a danger that is either known at the time
21 of manufacture, or that becomes known after manufacture. RCW 7.72.030(1)(b) and (c).
22 Under Washington law, a plaintiff may establish liability by using either a risk-utility test
23 or a consumer expectation test for both design defect and failure to warn claims. *Ayers v.*
24 *Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747 (1992) (en banc) (failure to warn
25 claim); *Falk v. Keene Corp.*, 113 Wn.2d 645, 782 (1989) (en banc) (design defect claim).
26 Although RCW 7.72.030 uses the term “negligence,” strict liability is the applicable
27 standard for a failure to warn or a design defect claim maintained under RCW 7.72.030(a)
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1 or (b). *Ayers*, 117 Wn.2d at 765; *Soproni v. Polygon Apartment Partners*, 137 Wn.2d
2 319, 326-327 (1999) (citing *Falk*, 113 Wn.2d at 653). However, for failure to warn
3 claims involving a danger that becomes known after manufacture, a negligence standard
4 is applied. *Ayers*, 117 Wn.2d at 765.

5 A plaintiff who seeks to establish liability of a manufacturer under RCW
6 7.72.030(1)(a) or (b) may do so in two ways. *Soproni*, 137 Wn.2d at 326-327 (citing
7 *Falk*, 113 Wn.2d at 653). One way is referred to as the “consumer expectations” test,
8 “which requires the plaintiff to show that the product was ‘unsafe to an extent beyond that
9 which would be contemplated by the ordinary consumer.’” *Id.* at 327. The second way a
10 plaintiff may attempt to establish liability is the “risk-utility test.” *Id.* at 326.

11 Here, Defendants have moved for summary judgment regarding Kirkland’s use of
12 the risk-utility test to prove failure to warn at the time of manufacture and his use of the
13 consumer expectations test to prove failure to warn at the time of manufacture, design
14 defect and any independent strict liability claim he may attempt to bring under the
15 consumer expectations test. Dkt. 52. Defendants also seek summary judgment regarding
16 Kirkland’s negligence claim regarding their failure to warn after manufacture. *Id.*

18 **C. Failure to Warn or Provide Adequate Instructions**

19 Under RCW 7.72.030(1), “[a] product manufacturer is subject to liability to a
20 claimant if the claimant’s harm was proximately caused by the negligence of the
21 manufacturer in that the product was not reasonably safe as designed or not reasonably
22 safe because adequate warnings or instructions were not provided.” The definition of
23 “not reasonably safe,” for purposes of a suit alleging failure to warn or give adequate
24 instructions regarding dangers existing at the time of manufacture, is provided by RCW
25 7.72.030(1)(b):

26 A product is not reasonably safe because adequate warnings or
27 instructions were not provided with the product, if, at the time of
28 manufacture, the likelihood that the product would cause the claimant’s

1 harm or similar harms, and the seriousness of those harms, rendered the
2 warnings or instructions of the manufacturer inadequate and the
3 manufacturer could have provided the warnings or instructions which the
claimant alleges would have been adequate.

4 In addition, RCW 7.72.030(1)(c) provides the definition of “not reasonably safe” for
5 purposes of allegations of failure to warn or give adequate instructions regarding dangers
6 learned of after the time of manufacture:

7 A product is not reasonably safe because adequate warnings or
8 instructions were not provided after the product was manufactured where a
9 manufacturer learned or where a reasonably prudent manufacturer should
10 have learned about a danger connected with the product after it was
11 manufactured. In such a case, the manufacturer is under a duty to act with
regard to issuing warnings or instructions concerning the danger in the
manner that a reasonably prudent manufacturer would act in the same or
similar circumstances. This duty is satisfied if the manufacturer exercises
reasonable care to inform product users.

12 **1. Proximate Cause**

13 In order to recover under the WPLA for failure to warn or instruct, a plaintiff must
14 must show that defendant’s inadequate warnings were the proximate cause of their
15 injuries. RCW 7.72.030(1). To meet the requirements of proximate causation, a plaintiff
16 must put forth evidence of both cause in fact and legal causation. *Baughn v. Honda*
17 *Motor Co.*, 107 Wn.2d 127, 139-42 (1986). “Cause in fact refers to the ‘but for’
18 consequences of an act – the physical connection between an act and an injury.” *Hartley*
19 *v. State*, 103 Wn.2d 768, 778 (1985). Legal causation, on the other hand, involves the
20 “determination of whether liability should attach as a matter of law given the existence of
21 cause in fact.” *Id.* at 779.

22 Here, Defendants argue that the Court should grant summary judgment on all of
23 Kirkland’s failure to warn claims because he cannot show that any failure to warn on the
24 part of Defendants proximately caused his injuries because he was aware of the open and
25 obvious hazard that caused such injuries. Dkt. 52 at 14-18. Specifically, Defendants
26 maintain that Kirkland “testified that the risks of working around and over newly-formed,
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1 molten glass were ‘obvious,’ and he knew he could be severely burned, such as the injury
2 that occurred here.” Dkt. 52 at 15.

3 In his opposition to the instant motion, Kirkland argues that his “failure to warn”
4 claims are actually based on Defendants’ failure to provide adequate instructions to
5 Cameron or J.H. Kelly, LLC (“JH Kelly”)¹, “about how to reduce or eliminate the known
6 hazard of workers coming into contact with extremely hot bottles on the conveyor when
7 working over the conveyor, despite expressly acknowledging the need for such
8 instructions in [their] Technical Report regarding Individual Section machines.” Dkt. 57
9 at 11-12. Kirkland contends that the evidence shows that if Defendants had provided
10 Cameron with instructions regarding the need for a protective cover over the conveyor,
11 Cameron would have provided such a cover. Dkt. 57 at 12. To support this contention,
12 Kirkland states that when the need for a protective cover was brought to Cameron’s
13 attention following Kirkland’s injury, Cameron employees promptly “developed two
14 different devices to protect workers from coming into contact with hot bottles when
15 working over the conveyor.” Dkt. 57 at 12; *see* Dkts. 60, Exhs. 9 & 62, Exhs. 16, 17. In
16 addition, Kirkland maintains that Defendants’ argument that the open and obvious nature
17 of the hazard in this case precludes a finding of proximate cause is not controlling
18 because the cases they rely upon did not involve a “manufacturer’s failure to provide
19 instructions about how to eliminate or reduce the obvious hazards involved with the use
20 of a product.” Dkt. 57 at 13. In the cases relied upon by Defendants, the courts reasoned
21 that a warning would have served no purpose and therefore, the lack of warning was not
22 the proximate cause of the injury. *See* Dkt. 52 at 14-18 (citing *Soproni*, 137 Wn.2d at
23 326; *Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn.2d 248, 257; *Anderson v. Weslo, Inc.*,
24 79 Wn. App. 829, 839 (1995)). According to Kirkland, “[h]ere, in contrast, if
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28 ¹ JH Kelly was the engineering, procurement, and construction general contractor for the
Cameron project. Dkt. 52 at 2.

1 [Defendants] had provided instructions regarding the need for a protective cover over the
2 conveyor, the evidence indicates that Cameron Glass would have provided a protective
3 cover (as they did after Mr. Kirkland was injured), and that Mr. Kirkland's injuries would
4 have been prevented." Dkt. 57 at 13.

5 **a. Federal Rule of Evidence 407**

6 In their reply, Defendants argue that the evidence presented by Kirkland regarding
7 Cameron's subsequent remedial measures in developing the protective covers is
8 inadmissible under Rule 407 of the Federal Rules of Evidence and therefore should not be
9 considered by the Court on summary judgment. Dkt. 69 at 4-5. Rule 407 states that

10 [w]hen, after an injury or harm allegedly caused by an event,
11 measures are taken that, if taken previously, would have made the injury or
12 harm less likely to occur, evidence of the subsequent measures is not
13 admissible to prove negligence, culpable conduct, a defect in a product, a
defect in a product's design, or a need for a warning or instruction.

14 However, the Ninth Circuit has explicitly held that Rule 407 "only applies to a
15 *defendant's* voluntary actions." *Pau v. Yosemite Park and Curry Co.*, 928 F.2d 880, 888
16 (1991) (emphasis in original) (citing *Causey v. Zinke (In re Aircrash in Bali, Indonesia)*,
17 871 F.2d 812, 816-17 (9th Cir. 1989)). The Ninth Circuit explained that

18 Rule 407 is based on the policy of encouraging potential defendants to
19 remedy hazardous conditions without fear that their actions will be used as
20 evidence against them. *Gauthier v. AMF, Inc.*, 788 F.2d 634, 637 amended,
21 805 F.2d 337 (9th Cir. 1986). A nondefendant will not be inhibited from
taking remedial measures if such actions are allowed into evidence against a
defendant. *Causey*, 871 F.2d at 816-17.

22 *Pau*, 928 F.2d at 888. Here, the evidence presented by Kirkland relates to subsequent
23 remedial measures taken by Cameron, not Defendants. Therefore, the Court concludes
24 that such evidence is not precluded by Rule 407.

25 **b. Open and Obvious Hazard**

26 Although Defendants maintain that the open and obvious nature of the hazard at
27 issue in this case precludes a finding of proximate cause, the Court disagrees. As argued
28 by Kirkland, the cases cited to by Defendants in support of this contention did not involve

1 facts analogous to those present here. While the courts in *Soproni*, *Hiner*, and *Anderson*
2 held that proximate cause was lacking and took into account the open and obvious nature
3 of the hazard involved in those cases, the court's conclusion in each case was based on
4 the fact that there was insufficient evidence to show that the plaintiff would have heeded
5 any warning if one were given. 137 Wn.2d at 325-26; 138 Wn. 2d at 256-58; 79 Wn.
6 App. 839-40. In other words, the courts held that there was no evidence to show that but
7 for the lack of warning, the injury would not have occurred. *Id.* Here, Kirkland has
8 presented evidence, in the form of Cameron's subsequent remedial measures, that but for
9 the lack of instruction from Defendants to Cameron, Cameron would have used protective
10 covers and Kirkland's injury would have been prevented. Dkts. 60, Exh. 9 & 62, Exhs.
11 16, 17. Defendants have presented their own evidence, in the form of Meredith Keller's
12 declaration, that even if Defendants had given instructions to Cameron regarding the need
13 for protective covers, Cameron would not have heeded the instruction. Dkt. 61-1. Based
14 on the evidence presented by both parties, the Court concludes that there is a genuine
15 issue of material fact whether Defendants' failure to provide Cameron with instructions
16 was the cause-in-fact of Kirkland's injury.

18 **c. Legal Causation**

19 Defendants also argue that, regardless of the cause-in-fact, there is no legal
20 causation to support Kirkland's claim. Dkt. 52 at 15-18. Washington courts consider
21 legal causation in the context of a number of public policy considerations, such as the
22 ends of justice, importance of precedent, and application of common sense, which stem
23 from the particular facts of the case. *Anderson*, 79 Wn. App. at 838. That is, should the
24 law impose liability in this type of situation. Here, the Court concludes that all of these
25 factors weigh in favor of finding legal causation. The Court has concluded that Kirkland
26 should be able to present evidence to a jury to support his position that Defendants'
27 failure to give proper instructions to Cameron was a cause-in-fact of his injury. The
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1 Court concludes that public policy supports a finding of legal causation where, as here,
2 Kirkland intends to prove that if Defendants had given proper instructions to Cameron
3 regarding the need for protective covers, such instructions would have been followed and
4 Kirkland's injury would have been prevented.

5 **d. Conclusion**

6 Because the Court has concluded that proximate cause will be an issue for the jury,
7 Defendants are not entitled to summary judgment of Kirkland's failure to warn claims
8 based on a lack of proximate cause.

9 **2. Risk Utility Test**

10 Under the balancing test contained in RCW 7.72.030(1)(b), also known as the risk-
11 utility test, the trier of fact must balance the likelihood that the product would cause the
12 harm complained of, and the seriousness of that harm, against the burden on the
13 manufacturer of providing an adequate warning or instruction. *See Ayers*, 117 Wn.2d at
14 765. Here, Defendants maintain that the Court should grant summary judgment of
15 Kirkland's failure to warn claim based upon a risk-utility test because he cannot show
16 proximate cause. However, because the Court has concluded, as discussed above, that
17 proximate cause will be an issue for the jury, the Court also concludes that Defendants are
18 not entitled to summary judgment of Kirkland's failure to warn claim based on a risk
19 utility test.

20 **3. Consumer Expectations Test**

21 The consumer expectations test can be used to prove failure to warn or design
22 defect claims under the WPLA and also provides an independent basis for determining
23 that a product is "not reasonably safe" for purposes of a WPLA claim:

24 In determining whether a product was not reasonably safe under this
25 section, the trier of fact shall consider whether the product was unsafe to an
26 extent beyond that which would be contemplated by the ordinary consumer.

27 RCW 7.72.030(3).
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1 Defendants argue that Kirkland cannot satisfy the consumer expectations test to
2 bring any of his claims under the WPLA “where the ‘ordinary consumer’ for purposes of
3 the test is a person with the knowledge and background of [Kirkland], who admits that he
4 was aware of the open and obvious hazard.” Dkt. 52 at 12. Kirkland maintains that
5 Defendants’ description of an “ordinary consumer” is incorrect in that the WPLA does
6 not define “ordinary consumer” and that “Washington courts have interpreted the term
7 according to its plain meaning – an ordinary consumer, not a consumer with specialized
8 knowledge or experience.” Dkt. 57 at 17 (citing for example *Soproni*, 137 Wn.2d at 327;
9 *Eriksen v. Mobay Corp.*, 110 Wn. App. 332, 344 (2002)). “In other words, it is for the
10 jury, as members of the community, to determine what the ordinary consumer would
11 expect in terms of product safety.” Dkt. 57 at 17-18.

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13 Although the Court agrees with Kirkland that it is a question for the jury to
14 determine what the ordinary consumer would expect in terms of product safety, it also
15 agrees with the court’s reasoning in *Kerzman v. NCH Corp.*, 2007 WL 765202 (W.D.
16 Wash. 2007) in holding that “Washington courts look to the class of persons expected to
17 use the product in determining the adequacy of the warning.” *Id.* at *4. Specifically, the
18 court held that

19 at trial Defendant may offer evidence to support a jury instruction
20 explaining the “ordinary user” test as taking into account the relative class
21 of persons that buy and use this product. Evidence to support such an
22 instruction would necessarily include evidence that Defendant sold [its
product] only to carpet cleaning professionals, or others similarly situated,
and not to the public at large.

23 *Id.* Here, even assuming the definition of ordinary consumer in this case will take into
24 account the relative class of persons that buy and use Defendants’ product, the Court
25 concludes that Defendants have not shown that Kirkland cannot prove its product liability
26 claims by presenting evidence that Defendants’ product was not reasonably safe based on
27 what the ordinary consumer would expect. Therefore, Defendants are not entitled to
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1 summary judgment of Kirkland's failure to warn claims based upon the consumer
2 expectations test.

3 **D. Design Defect**

4 Here, for purposes of design defect, Defendants only seek summary judgment of
5 Kirkland's design defect claim under the consumer expectations test. Dkt. 52 at 1 (stating
6 that Defendants do not seek summary judgment of Kirkland's design defect claim under
7 the risk utility test). Under the consumer expectations test, "a plaintiff need not prove
8 that a product is defective as a separate matter." *Lenhardt v. Ford Motor Co.*, 102 Wn.2d
9 208, 211 (1984) (internal citations omitted). "Recovery is allowed if the jury determines
10 that the product is dangerous to an extent beyond that which is contemplated by the
11 ordinary consumer." *Id.*

12 Here, because the Court has concluded, as discussed above, that whether
13 Defendants' product was unsafe to an extent beyond that which would be contemplated
14 by the ordinary consumer is an issue for the jury, the Court also concludes that Defendant
15 is not entitled to summary judgment of Kirkland's design defect claim based upon the
16 consumer expectations test.

17 **E. Separate Claim Under the Consumer Expectations Test**

18 The consumer expectations test, as stated in RCW 7.72.030(3), provides an
19 independent basis for liability under the WPLA. *Ayers*, 117 Wn.2d at 765 (citing *Falk*,
20 113 Wn.2d at 654). Thus, even if a plaintiff fails to otherwise establish a claim under the
21 WPLA, "the plaintiff may nevertheless establish manufacturer liability by showing the
22 product was unsafe to an extent beyond that which would be contemplated by the
23 ordinary consumer." *Falk*, 113 Wn.2d at 654.

24 Here, because the Court has concluded, as discussed above, that proximate cause
25 and whether Defendants' product was unsafe to an extent beyond that which would be
26 contemplated by the ordinary consumer are issues for the jury, the Court also concludes
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1 that Defendants are not entitled to summary judgment of any claim Kirkland may bring
2 under RCW 7.72.030(3).

3 **IV. ORDER**

4 Therefore, it is hereby **ORDERED** that Defendant's motion for summary
5 judgment (Dkt. 52) is **DENIED**.

6 DATED this 14th day of April, 2011.

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9 BENJAMIN H. SETTLE
10 United States District Judge
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